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USA Power LLC, USA Power Parterns L.L.C., and Spring Canyon Energy, LLC v. Pacificorp, Jody L. Williams, and Holme Roberts and Owen, LLP : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

USA POWER LLC, USA POWER PARTNERS, L.L.C., and SPRING CANYON ENERGY, LLC, Plaintiffs and Appellants, vs. PACIFICORP, JODY L. WILLIAMS and HOLME, ROBERTS & OWEN, LLP, Defendants and Appellees.	Supreme Court Case No. 20080176-SC

REPLY BRIEF OF APPELLANTS USA POWER, LLC, USA POWER PARTNERS, L.L.C., AND SPRING CANYON ENERGY, LLC

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, HONORABLE TYRONE E. MEDLEY

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Appellees' Briefs fail to establish a basis for the grant of summary judgment below. Appellees' arguments ignore credible evidence contrary to their positions, draw inferences in their favor, focus on facts immaterial to USA Power's[1] claims, and fail to address dispositive issues. Despite Appellees' contentions, the ultimate issue before this Court is whether USA Power has evidence from which a reasonable fact finder could find in its favor. As outlined in USA Power's opening Brief, it unquestionably does.

For USA Power's trade secret claim against PacifiCorp, all that was required to survive summary judgment was for USA Power to present evidence that it had compiled information that was of more than trivial value because it was not generally known or ascertainable and that PacifiCorp used any part of that information without permission. USA Power is entitled to present its case to a jury because, by the end of 2002, USA Power had compiled information that demonstrated a dry-cooled power plant with Spring Canyon's characteristics was economically feasible in Mona, Utah. This was valuable because neither PacifiCorp nor anyone else had gone through the time and expense to learn it *at that time*, as demonstrated by PacifiCorp's own agreement that USA Power's information was confidential and authorization to pay up to $3.5 million for it. PacifiCorp used that information because, in February 2003, without engaging its own efforts constituting the "preliminary design" stage of a power plant development, PacifiCorp determined to site a plant in Mona.

PacifiCorp's arguments seeking to evade the consequences of its unlawful conduct are without merit. USA Power properly complied with Rule 7 in opposing PacifiCorp's summary judgment motion. Based upon the responses to the specific numbered paragraphs

[1]Unless otherwise noted, abbreviated terms are as defined in USA Power's opening Brief.

and USA Power's statement of additional disputed facts, it was abundantly clear that (1) USA Power has a view of the facts that differed from PacifiCorp's, (2) USA Power's view of the facts is supported by evidence, and (3) on USA Power's view of the facts, the law provides a remedy through trade secret and breach of contract claims. PacifiCorp's "core facts" do not change this result. The core facts regarding Panda do not entitle PacifiCorp to summary judgment because Panda was developing a fundamentally different project (a 1000 MW wet-cooled plant) that resulted in only two assets to PacifiCorp (met data and a land option) and did not provide a basis for PacifiCorp to site a 500 MW dry-cooled plant in Mona or to complete the Current Creek project in time to win the RFP. The core facts regarding Spring Canyon do not entitle PacifiCorp to summary judgment because the evidence demonstrates USA Power's compilation of information was valuable, was not publicly disclosed, and was the only basis *at the time* on which PacifiCorp could have decided to site Current Creek at Mona. And the core facts regarding Shaw do not entitle PacifiCorp to summary judgment because Shaw was hired only *after* PacifiCorp had misappropriated USA Power's trade secret, and the preliminary design information for Shaw's Apex 1 plant (in a different location and elevation) could not have provided a basis for PacifiCorp's decision to site Current Creek at Mona.

PacifiCorp otherwise attempts to mischaracterize the evidence. PacifiCorp asserts USA Power's work was merely "preliminary," which it equates with valueless, despite that the work constituted the "preliminary design" phase of a power project, was unquestionably valuable, and was the only source from which PacifiCorp could have based its decision to site a plant in Mona in time to submit a competing project *by July 2003* to win the RFP.

Williams/HRO, likewise, do not demonstrate it was correct to grant summary judgment on USA Power's claims for breach of the duty of confidentiality or loyalty. Regarding confidentiality, Williams/HRO seek to ignore the evidence that they communicated the identity of the narrowed group of potential willing water rights sellers in Juab County appropriate for a power plant, they disclosed the confidential purchase price of USA Power's water rights, and they exploited for PacifiCorp's benefit their knowledge gained while working for and being paid by USA Power. Williams/HRO assert the existence of this evidence was not preserved below, but this was unquestionably preserved because USA Power's counsel explicitly described the items to the district court and evidence of disclosure was a central issue of the district court's decision. Further, the narrowed pool of potential *willing sellers* was not publicly available merely because the universe of water rights *owners* might exist in the public record.

Regarding the loyalty claim, Williams/HRO have not demonstrated they did not breach the duty as an alternative ground to affirm summary judgment. The evidence shows Williams/HRO simultaneously represented both USA Power and PacifiCorp because Williams/HRO's own conduct demonstrates the attorney-client relationship with USA Power continued through November 2003 -- some eight months after they began representing PacifiCorp. Further, the representation of PacifiCorp was directly adverse to USA Power. The scope of Williams/HRO's representation of USA Power extended to the entire Spring Canyon project, Williams/HRO represented PacifiCorp with regard to its Current Creek project. Because those projects were directly adverse as competing for a single contract awarded through a bidding process for the single plant that could have been built in Mona,

representation of PacifiCorp breached Williams/HRO's duty of loyalty to USA Power.

Williams/HRO have also not demonstrated their breach of their duty of loyalty did not cause USA Power damages. The evidence shows a reasonable likelihood that, absent Williams/HRO agreeing to represent PacifiCorp, PacifiCorp (1) would not have reneged on its agreement to purchase Spring Canyon or (2) would not have been able to complete its competing Currant Creek project in time to award itself the RFP, either of which would have benefitted USA Power. Williams/HRO assert USA Power did not finish second in the RFP bidding process, when there is evidence to the contrary. Williams/HRO's services were indispensable to PacifiCorp winning the RFP over USA Power. In addition, only one power plant can be built in Mona. As a result, there are disputed issues of fact as to causation and the district court erred in granting Williams/HRO summary judgment on this basis.

I. PACIFICORP'S ARGUMENT FOR AN "ABUSE OF DISCRETION" STANDARD OF REVIEW HAS NO APPLICATION ON THIS APPEAL.

The Court should reject PacifiCorp's assertion that the district court's rulings pursuant to Utah Rule of Civil Procedure 7 are reviewed for "abuse of discretion." (PaC Br. 3)[2] An appellate court reviews a district court's grant of summary judgment in three stages. First, whether a non-moving party has complied with Rule 7 is a question of law reviewed for correctness. See Avila v. Winn, 794 P.2d 20, 22 (Utah 1990).[3] If a party fails to comply with

[2]USA Power's initial Brief is cited as "Br." PacifiCorp's Brief of Appellee is cited as "PaC Br." Jody Williams and HRO's Brief of Appellee is cited as "HRO Br."

[3]As described in USA Power's initial Brief, it did comply with the plain terms of Rule 7 by responding to a statement of purportedly undisputed fact, explaining the basis of that dispute or identifying disputed inferences Appellees sought drawn in their favor, and citing to evidence that supported USA Power's position. (Br. 43-53) PacifiCorp's argument that something more should be required and use of isolated examples it states did not comply with that heightened standard is not supported by the plain terms of the rule. (PaC Br. 25-51)

the rule then, second, the Court reviews for an abuse of discretion the district court's decision to deem certain facts admitted. Bluffdale City v. Smith, 2007 UT App 25, ¶ 5, 156 P.3d 175. In the third stage, an appellate court reviews the district court's grant of summary judgment based upon all facts, including any facts deemed admitted under Rule 7, for correctness. Id.

Abuse of discretion does not apply in this case because the district court's "stage two" decision to deem facts admitted, while in error, is not essential to reversal. The district court's errors dispositive of the appeal occurred at the first stage, when it erroneously determined that USA Power failed to comply with Rule 7, and at the third stage when, given a set of purported facts, the court ruled Appellees were entitled to summary judgment. These rulings are reviewed for correctness.[4]

II. PACIFICORP'S THREE "CORE" GROUPS OF FACT DO NOT ESTABLISH THERE ARE NO DISPUTED ISSUES FOR TRIAL AND ITS ARGUMENTS IN SUPPORT OF THE DISTRICT COURT'S CONCLUSIONS IMPROPERLY DRAW FACTUAL INFERENCES IN ITS OWN FAVOR.

Notwithstanding PacifiCorp's label of "undisputed" on the Statement of Facts it copy-and-pasted from its memorandum below, PacifiCorp relies upon facts that are disputed, recites facts that are not material to USA Power's claims, and draws factual inferences in its own favor despite being the summary judgment movant.

PacifiCorp has failed to demonstrate that its "core undisputed facts" entitle it to summary judgment because, even if true, its "core" facts do not establish there are no

[4]To the extent the district court interpreted Rule 7 to allow it to deem admitted factual inferences and facts not actually contained in PacifiCorp's statement of undisputed facts, this Court reviews for correctness. See City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah 1990). In any event, the plain language of Rule 7 only allows a district court to deem admitted facts contained in the movant's statement of facts. Utah R. Civ. P. 7(c)(3)(A).

disputed issues for trial, and USA Power controverted the material parts of those "core" facts.

A summary judgment movant has an affirmative burden to establish there are no genuine issues of material fact and that the movant is entitled to summary judgment. See Utah R. Civ. P. 56(c); Orvis v. Johnson, 2008 UT 2, ¶ 18, 177 P.3d 600. It is not enough for a summary judgment movant to simply point to a list of some facts that are not in dispute -- those facts must also demonstrate the movant is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c); Orvis, 2008 UT 2 at ¶ 18. If a movant fails to meet this burden, summary judgment may not be granted and the nonmovant is under no obligation to come forward and rebut the movant's purported facts. See Orvis, 2008 UT 2 at ¶ 18.

Here, the district court erroneously concluded that PacifiCorp met its burden as movant because PacifiCorp's "core" facts do not demonstrate it is entitled to judgment without also relying on disputed factual inferences drawn in PacifiCorp's own favor. Moreover, although not required to come forward with its own facts to counter PacifiCorp's facts, USA Power did present credible, admissible evidence demonstrating that, for each of USA Power's claims, disputed issues of material fact preclude summary judgment. USA Power directly controverted all portions of PacifiCorp's core "facts" and identified those disputed inferences that PacifiCorp was relying upon and without which PacifiCorp was not entitled to judgment as a matter of law. USA Power did so in both its numbered response to PacifiCorp's purportedly undisputed facts and its additional statement of material facts. Doing so complies with the plain language of Rule 7, is not merely arguing about the implication of facts, and does not elevate form over substance. (PaC Br. 21)

Rather than address these facts, PacifiCorp largely ignores the facts contained in USA

Power's response to its "undisputed facts" and wholly ignores the additional contrary facts contained in USA Power's twenty-nine page statement of additional facts, presented in compliance with Rule 7. (R5935-64)[5] Consequently, PacifiCorp conducts its entire argument based on this incomplete and subjective version of the facts, which renders PacifiCorp's entire argument flawed. None of PacifiCorp's "core" facts demonstrate there are no disputes of material fact or that PacifiCorp was entitled to judgment as a matter of law.

1. PacifiCorp's First Set of "Core Facts" is Disputed. Based upon its first "core" group of facts, found in paragraphs one through eleven of PacifiCorp's Statement of Undisputed Facts ("Statement") (the "Panda Facts"), PacifiCorp argues the district court properly concluded the Panda Facts "identified . . . PacifiCorp's ultimate purchase of Panda Energy's ("Panda") assets necessary for the development of the Currant Creek power plant in Mona." (R7603-04) Pacificorp attempts to connect Panda's limited work to PacifiCorp's development of Currant Creek by asserting that the "initial development work for Currant Creek was actually performed by Panda Energy." (PaC Br. 5; see also PaC Br. 17)

However, there were no ongoing negotiations between PacifiCorp and Panda between an initial meeting in 2001 and when PacifiCorp began negotiating to purchase the Panda project in late 2002. (R 4598-99, 7231-32) At most, there were sporadic contacts during which PacifiCorp expressed little interest in purchasing Panda until approximately the time PacifiCorp obtained access to USA Power's confidential information. (R2079-80, 3302-08,

[5]PacifiCorp states that USA Power could have controverted its facts "and/or provided a 'separate statement of additional facts in dispute.' . . . [but] did neither." (PaC Br. 21) This assertion is demonstrably false in light of the 29-page statement of additional facts submitted with citation to evidence. (R5935-64)

4614, 5458-90, 10391-403) PacifiCorp's representatives did not even travel to Mona to view the site at the initial meeting (R4615) and, as of July 2002, Panda still indicated it wanted to build the plant itself. (R3300, 8344) Ultimately, Panda did not tell PacifiCorp it would sell its project until late December 2002 (R7231-32), and PacifiCorp did not conduct any substantial due diligence until after it purchased the Panda project (R8397-98).

Further, PacifiCorp did not seriously consider purchasing the Panda project until early 2003. When PacifiCorp met with USA Power in late Summer 2002, PacifiCorp admitted it had not seriously contemplated a project in Mona. (R2114-15) As late as January 9, 2003, PacifiCorp did not even list the Panda site in its list of the six projects it was considering to meet its 2005 and 2007 power needs, and Panda did not provide PacifiCorp with any project details or summary of work completed until January 29, 2003 when PacifiCorp and Panda signed a letter of intent. (R7231-32, 10394)

Moreover, the "core" Panda Facts entirely fail to address the key disputed issue of whether Panda's limited investigation of a wet-cooled power project in 2000-2001 provided PacifiCorp a sufficient basis to site in Mona in 2003 a feasible dry-cooled project in the time frame required to comply with the RFP. (Br. 32-36, 60, 78-79) The Panda Facts do not address these material points and thus do not establish there are no genuine issues of fact.

In its argument, PacifiCorp sets forth eight "assets," it purportedly obtained from Panda in addition to Panda's land option and met data. Of these "assets," four consist solely of Panda "hiring" a water lawyer, a lobbyist, a market consultant, and environmental and air quality firms. (PaC Br. 8-9) No actual work is identified. The remaining four Panda assets consisted of a "visit" to the Mona Switching Station, a meeting with PacifiCorp's

transmission group, "locating" the Questar and Kern River gas lines, and "mapp[ing] out" two routes from those gas lines. (Id.) However, the record evidence establishes much more to the "initial development" of a power project, i.e., siting a project in a specific location, evaluating potential configurations, technologies, and fuel sources, obtaining key permits, determining financial viability, and eventually excluding other possibilities. (Br. 6-14) Merely obtaining land options, hiring consultants, and attending meetings is not the same.[6]

USA Power disputed these purported facts and inferences in compliance with Rule 7 by presenting credible, admissible evidence that Panda's negligible assets were meaningless in allowing a prudent utility to site in Mona a dry-cooled project of Currant Creek's size and characteristics in time to bid in the RFP.[7] (Br. 47-48; see also Br. 17-18, 26-28) Panda's investigation was (i) limited to scoping an oversized, wet-cooled power plant, (ii) produced only two assets of any value to PacifiCorp (met data and a land option), (iii) had "become kind of iffy" by 2002, and (iv) did not form a sufficient basis upon which a dry-cooled project could be developed under the RFP deadline. (Br. 47-48; see also id. at 17-18, 27) Consequently, whether Panda's work alone permitted PacifiCorp to develop its smaller, dry-cooled Currant Creek project in the limited time frame is disputed. In light of this dispute, it was error for the district court to conclude it was undisputed, based upon the Panda Facts, that PacifiCorp did not rely upon USA Power's trade secret information to develop its dry-cooled Currant Creek project in time to bid in the RFP.

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[6]The other purported Panda Facts fail to preclude the possibility that PacifiCorp used USA Power's confidential information in determining to pursue at Mona, and to the exclusion of other options, a project that would result in a plant online by 2005.

[7](R5949-52 at ¶¶ 44-48, 50-52, R5954-55 at ¶¶ 60-61 (responding to numbered paragraphs); see also R5936 at ¶ 3, R5938-39 at ¶¶ 11-12) (USA Power's additional disputed facts)

2. PacifiCorp's Second Set of "Core Facts" is Disputed. Based on its second "*core*" *group of facts, set out in paragraphs twelve through nineteen of PacifiCorp's* Statement (the "Spring Canyon Facts"), PacifiCorp asserts the district court properly ruled "USA Power publicly disclosed the technical details of its power plant when it filed for an air permit." (PaC Br. 23) Specifically, the district court concluded that paragraphs 13 and 17 of the Spring Canyon Facts demonstrated USA Power's "concept, vision and claimed confidential information were of public record, and were disclosed to PacifiCorp by the public record. Consequently, the information contained therein being generally known and readily ascertainable . . . cannot possibly constitute trade secrets." (R7605)

Critically, the district court and PacifiCorp both ignore that the most obvious piece of evidence contrary to their position -- PacifiCorp executed the Confidentiality Agreement with USA Power in September 2002, after PacifiCorp had obtained USA Power's air permit application, in which PacifiCorp agreed it would receive "**information with respect to a Potential Transaction that is confidential, proprietary and otherwise not publicly available.**" (R2621 (emphasis added), 6382-83)

Further, the Spring Canyon Facts do not support PacifiCorp's conclusion unless further disputed inferences are drawn in favor of PacifiCorp. PacifiCorp never alleged that all details of Spring Canyon were disclosed by USA Power's public filings. (PaC Br. 46; R8565-66) PacifiCorp even testified that USA Power's public filings did not reveal enough information to reverse engineer the project. (R5926) In fact, PacifiCorp has not introduced one single shred of evidence that the results of USA Power's preliminary engineering, water procurement, or financial pro formas -- all disclosed to PacifiCorp under the confidentiality

Agreement -- were ever disclosed to the public by any means.[8]

Moreover, USA Power specifically controverted this inference PacifiCorp sought to be drawn from the Spring Canyon Facts by citing to eleven specific elements of the Spring Canyon project that were never disclosed to the public, including the specific "energy penalty" calculations done by engineer Ray Racine. (Br. 46; R5924-26, 5940-48, 5952-53) Unable to produce any evidence that these elements were disclosed, PacifiCorp resorts to positing about the veracity and merit of Mr. Racine's studies in an attempt to somehow show this testing was publicly disclosed or could easily be reproduced. (PaC Br. 60-61, 63-69) PacifiCorp argues that Mr. Racine's work was merely "preliminary calculations" rather than testing. (Id. at 43, 61-63) PacifiCorp offers no support for the proposition that confidential "preliminary calculations" are afforded less trade secret protection than "testing."[9]

In fact, as discussed infra Part III.A, the preliminary design phase of a power project is a critical and confidential phase which must be completed before conducting any detailed design or construction. Because PacifiCorp has failed to present any evidence that USA Power's preliminary design data was disclosed to the public, the district court's conclusion that everything about Spring Canyon was so disclosed was error and should be reversed.

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[8]USA Power disputed the Spring Canyon Facts in its responses to PacifiCorp's numbered paragraphs (R5943-46 at ¶¶ 27, 29-32, 34) and in its additional statement of disputed facts. (R5938-39 at ¶¶ 8, 12-13, R5940-43 at ¶¶ 16-26, R5946-48 at ¶¶ 35, 38-41)

[9]The Court should also reject PacifiCorp's baseless assertions that, if a particular method of calculation is known in the industry -- here, water balance, energy penalty, and performance curve calculations -- the results of such calculations as applied to a unique location with distinct characteristics and then combined with other information that is not generally known cannot be a "trade secret." (PaC Br. 64-69) These arguments fail because PacifiCorp's new arguments regarding the caliber and complexity of Mr. Racine's calculations and the use of publicly available raw data: were not raised below; are pure argument lacking any evidentiary foundation; and address the relative weight of evidence.

3. PacifiCorp's Third Set of "Core Facts" is Disputed. Based on its third "core" group of facts, set out in paragraphs twenty through twenty-nine of PacifiCorp's Statement (the "Currant Creek Facts"), describing that Shaw/Stone & Webster ("Shaw") provided the detailed design and engineering of Current Creek, PacifiCorp asserts the district court properly concluded "it is undisputed that [Shaw] built a sister plant to the Currant Creek Power Plant (Apex 1), and that the Currant Creek Power Plant represents PacifiCorp's and Shaw/Stone & Webster's own work. . . . [T]he design, engineering and construction of [Currant Creek] was not based upon nor utilized any information from or about [USA Power] or the Spring Canyon Energy project." (R7604-05; see PaC Br. 23, 27-28)[10]

However, the "core" fact that Shaw, once hired by PacifiCorp, provided detailed design and engineering for Current Creek, even if true, is irrelevant because it occurred *after* PacifiCorp decided to site the plant in Mona. USA Power has never disputed that Shaw independently completed the design of PacifiCorp's Currant Creek project or that Shaw designed the dry-cooled Apex I power plant in Las Vegas, nor has USA Power claimed that Shaw copied its calculations.[11] Whether PacifiCorp hired Shaw to provide detailed design

[10]USA Power disputed the Current Creek Facts in its responses to PacifiCorp's numbered paragraphs (R5958-60 at ¶¶ 72-75, 79, R5963 at ¶¶ 86-87) and in its additional statement of disputed facts. (R5940-42 at ¶¶ 16-23, R5946 at ¶ 33, R5949-55 at ¶¶ 42-46, 48-62

[11]PacifiCorp misunderstands the relevance of the similarities between the Spring Canyon and Currant Creek projects. USA Power presented evidence that the projects are substantially similar, not for the purpose of claiming or implying that Shaw copied the Spring Canyon project wholesale, but because the similarity between the plants is evidence that PacifiCorp relied on USA Power's preliminary designs to site its plant in Mona. Preliminary design studies are specific to location and plant configuration. (R3705-09, 2102-05, 6312-13) In choosing to develop a dry-cooled project in Mona and committing substantial resources to that end, PacifiCorp relied on USA Power's preliminary testing, which showed that a power plant of Spring Canyon's design and configuration was feasible in Mona. The fact that Currant Creek is so similar to Spring Canyon provides evidence that Currant Creek

and provide a *post hoc* justification for its prior decision to site a dry-cooled plant with Spring Canyon's characteristics in Mona is irrelevant to whether PacifiCorp misappropriated USA Power's trade secret information by making that decision in the first place.

The evidence establishes genuine issues of fact regarding whether PacifiCorp misappropriated a trade secret when it relied upon USA Power's preliminary development information to determine, in early 2003, to site a combined-cycle power plant in Mona and subsequently committed millions of dollars towards this development before the utility ever hired Shaw. (R3730-33, 4824-26, 4841-42, 4846, 5012, 5016) As opined by USA Power's expert, this misappropriation allowed PacifiCorp to skip the crucial preliminary steps required to site a power plant. (R3729-32, 3748)

By the time Shaw was hired in late April 2003 to assist PacifiCorp with Currant Creek, the key events had already happened. PacifiCorp had decided to commit significant resources towards a plant in Mona -- a decision that requires preliminary engineering, including "energy penalty" calculations, that neither PacifiCorp nor Shaw had conducted at the time. In fact, Shaw did not complete any detailed performance testing until June 2003. (R3707-09, 4128-32, 6993-7000; see PaC Br. 19, 65) PacifiCorp's argument that Shaw eventually conducted the necessary feasibility studies, after PacifiCorp decided to build a dry-cooled plant in Mona does not cure PacifiCorp's prior misappropriation.[12]

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was based upon this site- and configuration-specific preliminary development information.

[12]PacifiCorp's assertion, that "within PacifiCorp's regulated environment the concept of 'profit' has absolutely no meaning" (PaC Br. 45), is not true. As a regulated entity, PacifiCorp cannot make capital expenditures for generation assets willy nilly, and expect the costs to be passed on by the PSC to rate payers. If constructing a dry-cooled plant in Mona would be more wasteful (in comparing capital expense to the generation output) than other options due to the energy penalty, there is less likelihood the entire capital expense would be

For the same reasons, whether or not the Apex 1 power plant and Currant Creek are similar is irrelevant to PacifiCorp's misappropriation of USA Power's trade secret information. Apex 1 is located in Las Vegas, and its site-specific preliminary development information has no application to a dry-cooled plant in Mona. (R4827-28, 2102-05, 3705-09)

Notwithstanding PacifiCorp's "core facts," summary judgment was in error.

III. PACIFICORP'S ARGUMENT MISCHARACTERIZES THE POWER PLANT DEVELOPMENT PROCESS AND NATURE OF WORK USA POWER HAD PERFORMED, AND OTHERWISE MISAPPLIES TRADE SECRET LAW.

PacifiCorp's arguments do not demonstrate it was correct to grant it summary judgment on USA Power's trade secret claim. Those arguments, first, ignore the nature of the power plant development process to minimize the apparent value of USA Power's trade secret and, second, shift focus from the key elements of USA Power's trade secret claim -- that USA Power's feasibility testing was part of a trade secret that PacifiCorp misappropriated when it relied upon that information to accelerate its competing project. PacifiCorp does so by focusing its arguments on: the constituent parts of the Spring Canyon project (rather than the project as a whole); the alleged similarity of USA Power's pre-disclosure testing with testing performed afterwards by PacifiCorp; its bald, after-the-fact assertion that Spring Canyon was not valuable (to the exclusion of substantial evidence); and its purported ability to reproduce USA Power's testing, without regard for the decisive time constraints. None of these arguments withstand scrutiny.

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passed on to rate payers. Even if PacifiCorp avoids the term "profit," it certainly considers revenue and unreimbursable costs for a project. (R7019-22, 7026-37 (describing PacifiCorp's assessment of project revenue and cost compared with regulatory impacts)

A. PacifiCorp Mischaracterizes the Nature of USA Power's Work.

PacifiCorp editorializes that the work USA Power performed was "preliminary" or "informal," implying that such work was cursory or valueless. (PaC Br. 63-68)

Developing a power plant consists of three phases: preliminary design, detailed design, and construction. (See R4666-77, 3705-09, 3721-29) The preliminary design phase is critical to the development of a power plant and consists of assessing various concepts, technologies, and combinations of structures to determine the feasibility of a particular plant design in a particular location. (Id.) This preliminary work is necessary before a developer can select a site and then commence the detailed engineering design of a power plant. (Id.) Merely because analyses are performed during the "preliminary" stage of development, does not mean they are valueless, inaccurate, or cursory.[13]

As outlined in USA Power's opening Brief, USA Power engaged in a lengthy and expensive process to assemble a variety of information and assets for its Spring Canyon

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[13]PacifiCorp's repeated assertions that Racine performed no testing, or merely cursory "back of the napkin" calculations (PaC Br. 60-61, 64-69) misrepresent Racine's testimony. Racine testified that he and Waldron worked on their calculations and testing for USA Power for over a year. (R6400) PacifiCorp questioned Mr. Racine at length about his testing and other services performed for USA Power, which is reflected in over 130 pages of deposition transcript (see R6868-6905), but isolates a few excerpts where PacifiCorp's counsel specifically asked Racine about sub-parts of some of his calculations and presents the parts as if they encompass the whole of Racine's testing. PacifiCorp would occasionally cut off Racine's attempts to explain that the parts being focused on did not accurately reflect Racine's combined global efforts. (E.g., R6895-96)

At page 61 of its Brief, PacifiCorp states "[Racine] merely performed preliminary calculations" regarding water requirements, citing page 103 of Racine's Deposition. However, at page 102, Racine explained the industry uses the term "preliminary" to refer only to the stage of development (R6896-97); the term does not denote the quality or value of an analysis. Likewise, PacifiCorp references an energy penalty calculation by Racine as "informal." (PaC Br. 63) Racine testified, however, that by "informal" he meant only manual (rather than computer generated) calculations. (R6904)

project that constituted the preliminary design stage of the development. The preliminary phase demonstrated, on a site-specific basis, that a 550 MW plant designed as an air (not water) cooled, gas-fired, combined-cycle plant in a 2x1 configuration with GE F7A turbines, duct firing, and zero discharge technology was both technologically viable and economically feasible at Mona, Utah. (Br. 6-15, 54-55) These preliminary development efforts are treated as confidential in the power industry and provide a substantial competitive advantage to a developer over those who have not completed these steps. (R3723-29)

It was the *proven viability* of this combination of information, including USA Power's economic pro formas and precise engineering calculations, that PacifiCorp relied upon when it made the decision to move forward with Current Creek at Mona, to the exclusion of other options, despite not performing its own preliminary testing, evaluation or modeling.

B. PacifiCorp Repeats the Error of the District Court by Attempting to Analyze Only Whether Elements of the Combination Are Trade Secrets, Rather than the Combination Itself.

PacifiCorp's arguments that USA Power had no trade secret are without merit because they address only whether component parts, rather than the combination of those components, constitute a trade secret. (PaC Br. 54-69). As explained in USA Power's opening Brief, the individual constituent elements of a trade secret need not be "secret" or not generally known (Br. 58-60), provided the combination of elements qualifies as a trade secret. Utah Code Ann. § 13-24-2(4)(a). A trade secret can be composed entirely of publicly known elements. Rivendell Forest Prods., Ltd. v. Georgia-Pacific Corp., 28 F.3d 1042, 1046 (10th Cir. 1994). By merely rearguing whether *parts* of USA Power's combination are trade secrets, PacifiCorp provides no reason to affirm.

C. Even Assuming the Nature of Spring Canyon's Constituent Elements Were Relevant to Determining the Existence of a Trade Secret, PacifiCorp Fails to Establish as an Undisputed Fact That All Those Elements Were Known Publicly or in the Power Generation Industry.

The Court should reject PacifiCorp's piecemeal analysis of Spring Canyon's constituent elements because, even if indulged, the analysis fails to establish that these elements, in isolation, were known to the public or those in the industry. (PaC Br. 57-69) PacifiCorp argues USA Power's studies proving feasibility did not constitute trade secrets by incorrectly asserting USA Power failed to conduct such studies, such studies were not necessary, and were implicitly disclosed.

First, PacifiCorp's allegation that "USA Power's engineer" had not conducted studies weighing the economics of dry-cooling vs. wet-cooling (PaC Br. 61), is incorrect. USA Power specifically had Waldron Engineering conduct such studies prior to USA Power's decision to use dry-cooling technology and Racine merely testified that he had never determined an economic "cut point" for dry vs. wet-cooling. (R2050-52, 3724, 6873) In fact, Racine had conducted extensive analyses of the energy penalty associated with dry-cooling and its effect on the project economics. That information was important to PacifiCorp, was specifically requested by PacifiCorp, and was shared with PacifiCorp at a time (fall 2002) when Thurgood did not believe dry-cooling was feasible in Mona due to its altitude. (R2102-03, 2114-15, 2141-43, 2157-59, 2664, 5155-56)

PacifiCorp's reliance on an isolated quote from a magazine article authored by USA Power's expert, for the proposition that dry-cooling can be made to work under most environmental conditions (PaC Br. 59), incorrectly equates the ability to make a dry-cooled

plant "work" with determining if the plant will be economically feasible, especially given the additional capital costs associated with dry-cooling.[14] (R2154-58)

PacifiCorp's arguments that the feasibility of dry-cooling at Mona was "implicit" in USA Power's decision to file for an air permit (PaC Br. 61-62) do not establish as undisputed that the *economic* feasibility of a dry-cooled plant there was publicly known. PacifiCorp's insinuation that one party's decision to file for an air permit can form a sufficient basis for another to site a plant in the same location, abandon other options, and commit millions of dollars to that development defies common sense and is disputed by PacifiCorp's own actions. (See R3721, 3729-32) Notwithstanding the air permit, PacifiCorp thought USA Power was wrong about the feasibility of dry-cooling in Mona until USA Power provided PacifiCorp with its confidential materials proving it. (R2114, 2158-59, 5012, 4976)

Finally, the Court should reject PacifiCorp's insinuations that the results of USA Power's water balance, energy penalty, and performance curve calculations cannot be part of a trade secret because the underlying methodology and some of the computer programs and raw data used were known or available publicly or in the power industry.[15] (PaC Br. 64-69) These arguments are contradicted by evidence and expert testimony showing that it was the results of USA Power's application of these methods and programs to the specific

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[14]PacifiCorp misstates the substance of the article by describing it as stating "dry cooling can be designed to work under environmental conditions that are expected to occur 99.44% of the time." (PaC Br. 59 (emphasis added)) The article does not address feasibility of dry-cooling in different locations -- it discusses the impact of changing seasonal environmental conditions on the performance of a dry-cooled plant in a particular location. (R6781)

[15]This argument is tantamount to claiming that any mathematical results that used a calculator could never be a trade secret because calculators are a publicly-available technology.

conditions in Mona that was not generally known. (R3721-28)[16]

D. PacifiCorp's Argument That USA Power's Combination Could Not Be a Trade Secret Because it Did Not Have Value Defies the Record.

The record flatly contradicts PacifiCorp's argument that USA Power had no trade secret because its compilation of confidential information was of no value.

First, notwithstanding PacifiCorp's assertion that its interest in purchasing the Spring Canyon project does not, per se, make USA Power's confidential information "trade secrets" (PaC Br. 55), the undisputed fact that PacifiCorp had authorized to pay up to $3.5 million for it is certainly evidence that USA Power's confidential information was (1) not generally known or readily ascertainable and (2) valuable.[17]

Second, the evidence shows that USA Power's confidential information was valuable. USA Power spent years and millions of dollars developing the Spring Canyon project, (R3729-33), which resulted in Spring Canyon having the substantial advantage of being the

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[16]PacifiCorp's argument that, when asked to describe USA Power's trade secret, Ted Banasciewicz merely created a list of the similarities between Spring Canyon and Currant Creek (PaC Br. 55), misrepresents the nature of that testimony and reads it entirely out of context. First, the portion of the deposition relied upon is not Ted's testimony as to the nature of USA Power's trade secret. Rather, it is a list of elements of PacifiCorp's Currant Creek plant that were similar to Spring Canyon. Ted even noted that he considered PacifiCorp's list "to be a list of the similarities between the two facilities." (R9227) It is simply not true that Ted created this list to describe USA Power's trade secret.

Second, the "list" was created by PacifiCorp -- not Ted. PacifiCorp's counsel stated to Ted, "you listed several times things about the Currant Creek Plant that indicated to you that PacifiCorp had stolen that plant . . . If you don't mind, I'm going to ask you to list those things on the board." (R9218) PacifiCorp's counsel then *dictated* to Ted a list of elements PacifiCorp had prepared, and asked Ted to act as a "scribe" and write down the elements PacifiCorp's counsel dictated from his list. (R9220; see also 9218-31)

[17]See Restatement (Third) of Unfair Competition § 39 cmt. e (1995) ("A trade secret must be of sufficient value . . . to provide an actual or potential economic advantage over others who do not possess the information. The advantage, however, need not be great. It is sufficient if the secret provides an advantage that is more than trivial.").

first project in the power transmission queue (R2046-47, 3723). Even after USA Power filed its air permit and water change applications, PacifiCorp still: (i) concluded that Spring Canyon was "the only viable project site that is capable of meeting a 2005 online date for a peaking unit with an efficient combined cycle design (versus a simple cycle design)," (R10398-403); (ii) recommended the purchase of Spring Canyon for "$5 million or less," (R10391-95); (iii) authorized Thurgood to purchase the Spring Canyon project for up to $3.5 million without further authorization, (R4813-18, 10403); (iv) admitted that it purchased Panda's assets, at least in part, as a bargaining chip in its negotiations to purchase Spring Canyon, (R2264, 10400); (v) admitted USA Power had a "competitive advantage that would take PacifiCorp two to three years and several million dollars to duplicate," (R 2116-17); and (vi) ultimately offered to purchase Spring Canyon for $3 million plus a five-year development agreement (R2210-13, 3259, 3669, 4564-68). At a minimum, there is a dispute of material fact for trial as to whether USA Power's confidential information had the value or potential value by which a jury could find it was a trade secret.

E. PacifiCorp's Argument that USA Power's Feasibility Testing Could Not Comprise a Trade Secret Because it Was Ascertainable, Ignores the Time Restraints of the Case.

PacifiCorp's argument that USA Powers water balance, energy penalty, and performance curve calculations could not be part of a trade secret combination because they might be independently reproduced by PacifiCorp, after PacifiCorp made the determination to move forward on a Mona project, ignores the specific time constraints of the IRP and RFP. (PaC Br. 65-69) Even if PacifiCorp and Shaw were "perfectly capable" of conducting all required testing (PaC Br. 66-67), that does not establish they could have completed the

requisite testing in time to sufficiently develop a dry-cooled project for Mona to bid in the RFP without relying upon USA Power's trade secret information.[18]

The short time frame in which new power generation resources were needed was a paramount concern for anyone wishing to submit a bid in the RFP, as PacifiCorp acknowledged (R 10392 (stating "perhaps the single most challenging aspect of the IRP, is the time frame in which the initial resources are needed.") As a result of USA Power's extensive preliminary development, the Spring Canyon project had the unique advantage of being the "first to market" power project and the only combined cycle power project capable of meeting PacifiCorp's 2005 power need. (R3724-25, 10394, 10397-99) In fact, PacifiCorp repeatedly acknowledged that Spring Canyon was the only power project capable of being online in time to meet its 2005 power demand. (R10394, 10397-99)

In contrast, PacifiCorp "developed" its Current Creek project in an unreasonably short time frame. The industry standard time for completing the development of a dry-cooled, combined-cycle power project of that size (500 MW) is eighteen to twenty-four months. (R3721) Due to the complicated process and host of other potential sites (PacifiCorp was evaluating eighteen sites as late as fall 2002), USA Power's expert concluded that PacifiCorp could not have performed the necessary preliminary development work in the four months before the July 2003 RFP deadline. (R3729-32) On February 27, 2003, a PacifiCorp

[18]The possibility that PacifiCorp might have on its own ultimately determined, after expending resources to do so, the economic feasibility in Mona of a dry-cooled power plant with Spring Canyon's characteristics does not deprive USA Power's compilation of information of trade secret status. See Restatement (Third) of Unfair Competition § 39 cmt.f (1995) ("[T]he requirement of secrecy is satisfied if it would be difficult or costly for others who could exploit the information to acquire it without resort to . . . wrongful conduct.").

employee, admitted that "[t]he preliminary work on a combined cycle power plant inside the Utah bubble has begun, and as usual we seem to be behind." (R5014) Further, PacifiCorp did not hire Shaw until April 17, 2003 -- barely three months before the RFP deadline of July 22, 2003 -- and Shaw did not run the performance curves for Currant Creek until June 2003 -- just one month before the RFP bid deadline. (R678, 4131-32)

In light of these facts, a jury could conclude that PacifiCorp could not have selected, much less developed, the Currant Creek project in time to bid in the RFP, unless it was relying on USA Power's confidential information that included the preliminary feasibility studies. That confidential information was not readily ascertainable and a trade secret.

F. PacifiCorp's Arguments There Has Been No Misappropriation Relative to USA Power's Feasability Testing Due to an Absence of Similarity with Those Performed by Shaw Distorts the Nature of Misappropriation.

The Court should reject PacifiCorp's arguments that there could have been no misappropriation of USA Power's trade secret due to differences between USA Power's and Shaw's respective testing. (PaC Br. 24-25, 61, 69, 72-73) In so arguing, PacifiCorp again assumes that misappropriation is only established if USA Power shows PacifiCorp or Shaw copied its testing. PacifiCorp's argument ignores the actual misappropriation here.

USA Power alleged and provided supporting evidence that the misappropriation occurred when PacifiCorp relied upon USA Power's confidential preliminary development information to select Mona and accelerate the development of a power plant there. PacifiCorp's reliance upon USA Power's confidential information showing the feasibility of a dry-cooled plant in Mona is the relevant similarity. Whether studies subsequently conducted by Shaw ultimately resulted in exact duplicates of USA Power's studies is beside

the point. Rather, because PacifiCorp made an irrevocable decision by February 2003 to site its plant in Mona, with only USA Power's knowledge at the time that doing so was feasible, its misappropriation had been accomplished by then. PacifiCorp's repeated reliance upon testing conducted *after* this point and its purported ability to have conducted such testing previously are irrelevant to the issue of whether PacifiCorp actually performed the required studies prior to the decision. (R4518-20, 3707-09, 3730-32, 4831-32, 4844-45)

PacifiCorp's admission that it concluded water-cooling was the most economical choice underscores this point. (PaC Br. 59-60) PacifiCorp could not have chosen Mona, from the various sites it was considering (see, e.g., R4819, 4960) as the site for its dry-cooled power plant and abandon other possible locations without USA Power's confidential information. Otherwise, it ran the risk, unacceptable for a large utility, of not obtaining sufficient water for a wet-cooled plant in arid Mona and not having an alternative less-arid location for a wet-cooled plant or lower elevation location for a dry-cooled plant.

Moreover, PacifiCorp's argument that a comparison of similarity must relate to an "innovative" feature of the trade secret misses the mark. (PaC Br. 72-73 (citing Stratienko v. Cordis Corp. 429 F.3d 1427, 1432 (7th Cir. 1994)).[19] To establish a lack of "innovative similarity," PacifiCorp erroneously defines USA Power's trade secret as only those elements of a power plant common to all power plants. PacifiCorp asserts that Spring Canyon, Currant

[19]The patent law concepts of novelty and invention have no application in the context of trade secrets. See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974); Rivendale Forest Prods., Ltd. v. Georgia-Pacific Corp., 28 F.3d 1042, 1044 (10th Cir. 1994). "'Novelty is only required of a trade secret to the extent necessary to show that the alleged secret is not a matter of public knowledge.'" SI Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1255 (3rd Cir. 1985) (citation omitted).

Creek, and Apex 1 all share the same surface characteristics and general overall structure and, therefore, none of their similarities are "innovative." (PaC Br. 73-74) This analysis, however, plainly ignores that the innovative features actually relevant are those constituting the preliminary feasibility studies used to site a plant in Mona and, because PacifiCorp had no such studies of its own and used USA Power's studies for Currant Creek, there is unquestionably similarity in this regard between Spring Canyon and Currant Creek.[20]

PacifiCorp's arguments that Apex 1 is similar to both plants and, therefore, none are innovative again disregards the similarity that is dispositive. The preliminary feasibility testing for Apex 1 is not similar to Spring Canyon or Currant Creek because it is site specific to Las Vegas, not Mona. Consequently, PacifiCorp's argument regarding "novelty" does not establish there was no dispute PacifiCorp did not misappropriate USA Power's trade secret.

Finally, PacifiCorp's case law does not establish no disputes regarding PacifiCorp's misappropriation and does not support PacifiCorp's assertion that USA Power resorts to sheer speculation. (PaC Br. 70-78) USA Power pointed to specific pieces of evidence and expert opinion establishing that disputed issues exist regarding whether, given all evidence,

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[20]PacifiCorp's reliance upon Keil, for the proposition that similarities which can be explained by industry or regulatory demands cannot support a finding of misappropriation (HRO Br. 72), is misplaced. In Keil, the court reviewed only whether the plaintiff had met its burden to show a defendant ex-employee stole its formula, sufficient to affirm the grant of a preliminary injunction. Water & Energy Sys. Tech. v. Keil, 1999 UT 16, ¶ 4, 8, 14, 974 P.2d 821. The only evidence before the court was that the defendant's formula was not copied from plaintiffs', there were significant differences between the formulae in question, chemical formulations in the relevant industry were largely driven by market and regulatory forces, relatively easy to determine, and frequently found in industry publications. Id. at 11-14. Here, in contrast, there is evidence of the wholesale, unaltered use of USA Power's trade secret and evidence that USA Power's studies were not publicly available, generally known, or largely driven by any regulatory or market forces.

PacifiCorp could have developed Currant Creek in four months. (Br. 58) In light of this, the case is not like Utah Med. Prods. v. Clinical Innovations Assocs., 79 F. Supp. 2d 1290, 1314 (D. Utah 1999), where the only evidence presented was the plaintiff's statement "I don't know how [the defendant] couldn't have used trade secrets." (PaC Br. 70).

Moreover, any unauthorized use of a trade secret constitutes a misappropriation. See Utah Code Ann. § 13-24-2(2). One need not create an exact replica of a trade secret to have misappropriated it.[21] When correct principles of trade secret law are applied in this case, at minimum, there are disputed issues on the question of misappropriation.

IV. WILLIAMS/HRO HAVE NOT SHOWN THERE ARE NO ISSUES OF FACT ON THE BREACH OF CONFIDENTIALITY CLAIM BECAUSE THERE IS EVIDENCE OF DISCLOSURE AND WILLIAMS/HRO'S ARGUMENTS DRAW DISPUTED INFERENCES IN THEIR FAVOR.

The Court should reject Williams/HRO's arguments that there are no issues of fact regarding Williams/HRO's disclosure of confidential information. Williams/HRO's arguments are contrary to the evidence and otherwise rely on disputed inferences.

A. The Record Refutes the Arguments There Was "No Evidence" and only speculation of Disclosure and Use of Confidential Information.

Williams/HRO's arguments that the direct evidence of their disclosure of USA Power's confidential information is, in actuality, "no evidence" are contrary to the record and incorrectly draw disputed inferences in their own favor.

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[21] See Computer Assocs. Int'l v. Quest Software Inc., 333 F. Supp. 2d 688, 696 (N.D. Ill. 2004) (stating defendants' reliance upon plaintiff's software source code as a guide to develop a competing product, without actual copying, likely rises to level of misappropriation); Hammerton, Inc. v. Heisterman, No. 2:06-CV-00806 TS, 2008 WL 2004327, at *10 (D. Utah May 9, 2008) (ruling ex-employee's customer list containing 27% of the names on former employer's customer list sufficient evidence of misappropriation to survive summary judgment).

Williams/HRO's reliance on Kilpatrick v. Wiley, Rein & Fielding, 2001 UT 107, 37 P.3d 1130 (Kilpatrick II), to argue USA Power was required to show that PacifiCorp's knowledge of USA Power's confidential price "could only have come from" Williams/HRO is misplaced because that part of Kilpatrick II is distinguishable dicta. (HRO Br. 42) The only issue before the Court in Kilpatrick II was whether the district court erred in finding, as a matter of law, the existence of an attorney client relationship. Id. at ¶ 36. The remaining discussion in Kilpatrick II only "briefly address[ed]" evidence of disclosure to "provide guidance for the trial court on remand" and is limited to the specific facts in that case. Id.

Further, unlike here, the plaintiff in Kilpatrick II had presented *no evidence* that the defendant attorney had disclosed any of its confidential information. (Id. at ¶¶ 2-32.) In contrast, USA Power has presented direct evidence that Williams/HRO disclosed its confidential information, including its confidential water price, to PacifiCorp. Moreover, the identity of potential water sellers contained in notes (addressed below) were not contained in the three volumes of confidential information USA Power gave to PacifiCorp and were not otherwise disclosed to PacifiCorp by USA Power. (R9848-10007, 10127-291, 10011-10090) Consequently, there is a reasonable basis upon which a finder of fact could infer that Williams/HRO disclosed further information. This case falls outside the scope of Kilpatrick II, and it is for a jury to decide if the quantum of what Williams/HRO disclosed caused USA Power harm.

1. PacifiCorp's handwritten notes. Williams/HRO's argument that the handwritten notes memorializing a conversation with Williams (R7137) is "no evidence" of disclosure because it does not mention USA Power, "their water sellers, or the price [USA Power] paid

for their water" (HRO Br. 34) is without merit.[22] First, it is irrelevant that the document does not explicitly mention USA Power or the two water sellers from whom USA Power ultimately purchased its water rights. The relevance and import of this document is that it reveals Williams/HRO disclosed to PacifiCorp USA Power's confidential price and the identities of potential water rights sellers in Juab County that Williams had located on USA Power's behalf and at its expense. This small group of water sellers had been assembled by Williams/HRO after a lengthy search which isolated, from all other Juab County water rights owners, those few owners whose water rights could be used to cool a power plant and who were potentially willing to sell those rights. (Br. 20 & authorities in n.30) This valuable information was assembled during the course of Williams/HRO's representation of USA Power and entirely at USA Power's expense. (Br. 30) Whether Williams/HRO mentioned USA Power explicitly in this conversation has no bearing on whether Williams/HRO divulged identities of sellers on that list.[23]

Second, the page, in fact, states the confidential $4000 per acre/foot price USA Power paid for its water -- *twice*. (Id.) To conclude that this document provides no evidence of Williams' disclosure, Williams/HRO must draw a key inference in their own favor: that the notes are not what they purport to be on their face -- a description of part of a conversation between a PacifiCorp employee and Williams where Williams disclosed USA Power's exact

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[22]These notes, produced by PacifiCorp, in which an employee documents a conversation with Williams, contain the names of Don Jones and Nephi Irrigation -- two Juab County water sellers Williams had located and with whom she had negotiated on USA Power's behalf -- as well as the exact $4000 confidential price USA Power paid. (R7137)

[23]Because the notes are not a verbatim transcript of the entire conversation, it is plausible that more information than that which is actually memorialized was also disclosed.

confidential price and the identities of two water rights sellers Williams had located on USA Power's behalf. Drawing such an inference is impermissible on summary judgment.

2. Water Rights Acquisition document. The argument that a document produced by Appellees entitled "Water Rights Acquisition" is no evidence of disclosure because it does not mention USA Power or its water rights and "there is no evidence that Ms. Williams prepared the document (PacifiCorp did)" (HRO Br. 34) is without merit.[24]

First, this document bears handwritten notes that Williams acknowledged she had written, (R2886-95, 8167 at 30), and Williams testified it was a "document Rand was drafting and I was giving some help on" (R8167 at 30). Regardless of whether the document mentions USA Power or its water rights by name, the document provides direct evidence that Williams/HRO disclosed USA Power's $4000 purchase price to PacifiCorp. Second, the assertion that there is no evidence Williams/HRO *prepared* the document is misleading. That Williams/HRO may not have *prepared* the document does not alter the fact that they *assisted* in its creation. This assistance reveals Williams/HRO's involvement with the document and provides a reasonable basis to conclude that some of the information in the document, particularly regarding water rights and prices, came from Williams/HRO.

Indeed, to conclude this is "no evidence" of Williams/HRO's disclosure requires the inference that when a water lawyer who has researched water prices in a particular region helps a business manager/engineer draft a document containing information about the price of water in that specific region, this information was supplied entirely by the business

[24]This document states that the current market price for water in the Mona area was currently $4000-$4500 per acre foot. (R2886-95, 2890)

manager. Such an inference is disputed and cannot be accepted on summary judgment.

Finally, Williams/HRO's argument, that its ultimate purchase of water rights from another county renders it unreasonable to infer that Williams/HRO used USA Power's confidential purchase price (HRO Br. 38), fails because the end location from which water rights were acquired does not negate the process to arrive at that end. The evidence establishes that Williams/HRO were able to more quickly conduct and conclude their search for water rights on PacifiCorp's behalf because Williams/HRO did not have to replicate their work ferreting out potential sellers or pursue dead ends realized in their representation of USA Power.[25] (Br. 79 n.70) Even if rights were eventually acquired from another county, this does not mean Williams/HRO did not avoid the delays exploring rights in Juab County by using knowledge gained as part of representing USA Power.[26]

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[25]Williams/HRO's argument that disclosure cannot be inferred from the short time it took them to obtain water rights for PacifiCorp ignores evidence in the record. (HRO Br. 39-40) USA Power identified numerous pieces of evidence that indicate Williams/HRO's acquisition of water rights for PacifiCorp was accelerated by their use and disclosure of USA Power's confidential information and that they obtained water rights for PacifiCorp in approximately one-fourth of the time it took them to negotiate for and obtain USA Power's water rights. (R2334, 3729-31, 3826-30; compare 5088X, with 2818, 3495)

[26]Williams/HRO's arguments that USA Power could not have been harmed by the use or disclosure of their confidential information, which were not asserted below, are incorrect. (HRO Br. 39 n.17, 47, 52) Harm caused by the use or disclosure only requires that absent the use or disclosure "a reasonable likelihood existed that the [plaintiffs] would have benefitted." Kilpatrick I, 909 P.2d at 1291-92. This is established by Williams/HRO's being able to accelerate the acquisition of water rights for PacifiCorp through avoiding delays that would otherwise be incurred based on knowledge and use of information regarding the narrowed pool of potential sellers, without which there is a reasonable likelihood PacifiCorp's competing project would not have been sufficiently complete to win the RFP, or PacifiCorp would not have reneged on its agreement to purchase Spring Canyon. (R2334, 3729-31, 3826-30; compare 5088X, with 2818, 3495)

B. Whether the Identity of All Water Rights Owners in Utah is Public Knowledge is Irrelevant to Whether the Narrowed Group of Potential Willing Sellers With Sufficient Water Rights For a Power Plant was Publicly Available.

The Court should reject Williams/HRO's argument that public records disclosing all water right owners renders non-confidential information obtained on USA Power's behalf as to the narrow pool of potential willing sellers with sufficient water rights for a power plant in Mona. (HRO Br. 3, 45) This argument, like Williams/HRO's assertions that the State Engineer is conversant with who may be willing to sell water, and that Williams knew generally how and where to identify water sellers, misses the point. Indeed, the argument is tantamount to asserting that a customer list could not be confidential merely because individuals on the list might also be found in a phone book.

The evidence establishes that Williams used her knowledge and experience to ferret out the specific water owners who owned and were willing to sell water rights suitable to cool a power plant in Mona, Utah. (Br. 79) Williams/HRO charged USA Power tens of thousands of dollars to render these services and the product of those services -- the narrow list of potential sellers -- belonged to USA Power and was not part of the public record or known to anyone but Williams/HRO and USA Power. (Br. 68) Merely because these individuals may be among the much broader group that public records disclose as owning water rights generally does not render the narrowed group Williams/HRO compiled at USA Power's expense also public knowledge, and Williams/HRO's argument does not establish as undisputed fact there was no disclosure of any confidential information.

V. DISPUTED ISSUES OF FACT REGARDING WHETHER WILLIAMS/HRO BREACHED THEIR DUTY OF LOYALTY PRECLUDE THE COURT FROM AFFIRMING THE DISTRICT COURT ON ALTERNATIVE GROUNDS.

The Court should reject Williams/HRO's argument that summary judgment on USA Power's claim for breach of their duty of loyalty could be affirmed on the alternate ground that there was no breach. (HRO Br. 56-62) The district court correctly concluded there are genuine issues of material fact regarding the scope and duration of Williams/HRO's representation of USA Power and the scope of Williams/HRO's representation of PacifiCorp, which preclude summary judgment in this regard. (R7617-20)

Whether an attorney has violated his or her fiduciary duty of loyalty is determined based upon the standard of conduct in the legal community. Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1290 (Utah Ct. App. 1996). An attorney breaches this duty when that attorney represents existing clients with conflicting interests, see, e.g., id., or represents "interest[s] adverse to a former client on a matter substantially related to the matter of engagement." Kilpatrick II, 2001 UT 107, at ¶ 53. An attorney's standard of conduct and whether that standard was met is established through expert opinion testimony. Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 262-64 (Utah Ct. App. 1997); Carlson v. Morton, 745 P.2d 1133, 1135, 1137-38 (Mont. 1987). If experts disagree whether that standard was breached, the jury decides the issue. Phillips v. Cohen, 400 F.3d 388, 399 (6th Cir. 2005).

USA Power's expert, Professor John K. Morris, concluded that "[w]hen Ms. Williams and HRO undertook representation of PacifiCorp in March 2003, Ms. Williams and HRO violated their duty of loyalty to [USA Power] because [USA Power] were still their clients and [USA Power] were directly adverse to PacifiCorp." (R3747) Williams/HRO's expert

reached the opposite conclusion. (See R3767-69) These conflicting expert opinions require a jury to decide between these two conclusions and summary judgment would be improper.

On appeal, Williams/HRO argue that the Court should affirm on the alternative ground that Williams/HRO did not breach their fiduciary duty of loyalty to USA Power. To support this position, Williams/HRO argue it is undisputed (1) they did not simultaneously represent both USA Power and PacifiCorp, and (2) the representation of PacifiCorp was not substantially related to their representation USA Power. Both arguments are incorrect.

A. There Are Disputed Issues of Material Fact Regarding the Duration of Williams/HRO's Representation of USA Power.

There are disputed issues of fact regarding whether Williams/HRO ceased representing USA Power on its Spring Canyon project in January 2003, before commencing representation of PacifiCorp on its Currant Creek Project. An attorney-client relationship exists when a party reasonably believes that the attorney represents them. Kilpatrick II, 2001 UT 107, at ¶49. Whether or not this belief was reasonable is a question of fact for a jury and ordinarily inappropriate for resolution on summary judgment.[27] Here, there are disputed facts demonstrating that Williams/HRO represented USA Power until November 2003.

Although hired as part of USA Power's development team, Williams never indicated, formally or informally, the attorney-client relationship had ended. (R2561-62) Between January 2003 and November 2003, USA Power continued to believe that Williams/HRO were its attorneys. (R3870, 5841-42) That belief was unquestionably reasonable, especially

[27] See Nielson v. Mauchley, 202 P.2d 547, 72 (Utah 1949) (whether plaintiff acted as reasonably prudent man is question for jury); see also Ilott v. Univ. of Utah, 2000 UT App 286, ¶ 18, 12 P.3d 1011 ("Questions of reasonableness necessarily pose questions of fact which should [ordinarily] be reserved for jury resolution.").

in light of Williams/HRO's following actions.

Documents drafted by Williams/HRO support the reasonableness of USA Power's belief and provide evidence that Williams/HRO intended for its representation of USA Power to be ongoing. The Water Right Option and Purchase Agreements Williams/HRO drafted indicated there would be an ongoing attorney-client relationship because they required "[a]ny and all notices, demands, or other communications required or desired to be given" under them to be sent to Williams/HRO. (R9920, 9942.)

For months after Williams/HRO argue their representation of USA Power ended, USA Power repeatedly cc'd Williams/HRO on various business correspondence regarding Spring Canyon, which Williams/HRO stamped as "received." (R2964-70) Williams/HRO did not return these materials or notify USA Power that it should stop sending Williams/HRO business documents about the Spring Canyon project because Williams/HRO considered its representation of USA Power to be completed and was currently representing its direct competitor, PacifiCorp. (R2569-71)

In March, 2003, after PacifiCorp ended its negotiations with USA Power, Ted called Williams to inquire if she knew of any parties that would partner with USA Power to provide funding for Spring Canyon in order to enhance their RFP bid. (R2233-34.) Williams told Ted she would take it under consideration and let him know if she thought of any potential partners. (Id.) Williams did not indicate that she was representing PacifiCorp or that Williams/HRO considered their representation of USA Power to be terminated. (Id.)

David Graeber, one of USA Power's principals, called Williams in September 2003, seeking legal advice about an air quality issue with the Spring Canyon project. (R2563)

Williams again said nothing about Williams/HRO's supposed belief that it no longer represented USA Power or that it was currently representing PacifiCorp (id.) and, after speaking with Mr. Graeber for approximately thirty minutes, Williams/HRO then rendered and billed USA Power for legal services. (R2393-95, 2563, 2897-99) Williams/HRO did so without opening a new client file or otherwise engaging procedures consistent with those services being provided to a new, rather than existing, client. (R2392-95, 4912-13) Despite repeated acts showing USA Power still considered them to be its lawyers, and multiple opportunities to indicate, formally or otherwise, that Williams/HRO considered the representation of USA Power to be ended, Williams/HRO never gave that indication.[28]

Under these circumstances, there are disputed issues of fact regarding whether Williams/HRO simultaneously represented USA Power and PacifiCorp and, therefore, the alternate ground on which Williams/HRO ask the Court to affirm is without merit.

B. There Are Disputed Issues of Fact Regarding the Scope of Williams/HRO's Representation of USA Power and PacifiCorp Which Preclude Summary Judgment That Williams/HRO Did Not Breach Their Duty of Loyalty.

There are disputed issues of fact, regardless of whether USA Power was a current or former client when Williams/HRO represented PacifiCorp, that preclude summary judgment on USA Power's claim for breach of the fiduciary duty of loyalty. A lawyer owes her client

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[28]There is no legal basis, and Williams/HRO provide none, for Williams/HRO's assertion that an existing attorney-client relationship should be considered "substantively identical to a former client relationship" (HRO Br. 59) for purposes of determining if the attorney owes an ongoing duty of loyalty merely because the attorney asserts she was not receiving any new information from the client. When a client hires an attorney, that attorney owes the duty of undivided loyalty throughout the entire duration of that relationship, Smoot v. Lund, 369 P.2d 933, 936 (Utah 1962), and cannot disregard that duty by representing a direct competitor for a single contract based on the ebb and flow of information over time.

a fiduciary duty of undivided loyalty. Smoot, 369 P.2d at 936. In Utah, that fiduciary duty prohibits a lawyer from concurrently representing clients with adverse interests, Kilpatrick, 909 P.2d at 1290, and from representing any interest adverse to a former client on a matter substantially related to the matter on which she represented the former client. Kilpatrick II, 2001 UT 107, at ¶ 53. These duties apply equally to water lawyers, who must adhere to the same standard of care as any other lawyer.

Williams/HRO incorrectly attempt to narrow the scope of representation from representing USA Power and PacifiCorp on their directly-competing power projects to only obtaining water rights in purportedly unrelated transactions.[29]

As discussed in USA Power's opening Brief, USA Power has described evidence that Williams/HRO actively represented USA Power on a broad range of matters regarding the development of Spring Canyon. (Br. 19-21 & record citations) This work included: negotiating land options, advising about strategy and planning, assisting with annexation agreements, a zoning variance, air permits and air credits, forming holding companies, contacting PacifiCorp about an interconnect agreement, and working with local government to create public support for the Spring Canyon project. (See Br. 19-21) This evidence establishes the scope of Williams/HRO's representation extended to all aspects of USA Power's power project and was in no way limited to a discrete water rights transaction.

Likewise, there are disputed issues of fact that show representation of PacifiCorp was both adverse to USA Power's interest and substantially related to USA Power's Spring

[29]HRO Br. 56 (stating representation as "simply obtain[ing] water for one client (and [doing] some related tasks), and then, after that job was finished, obtain[ing] water from a different area for a different client."). See also HRO Br. 2, 6-7, 26, 51, 60-61.

Canyon project. Williams/HRO began representing PacifiCorp with full knowledge of PacifiCorp's intent to use Williams/HRO's services to develop a power plant that would compete with the Spring Canyon project to be the one and only plant built in Mona.[30] (Br. 71, 78). Williams' services to obtain water for the competing PacifiCorp project were, therefore, directly adverse to USA Power.

Moreover, Williams/HRO did not limit their services on behalf of PacifiCorp to merely obtaining water rights but, rather, represented PacifiCorp on its overall development of the Currant Creek project, including: meeting with the Attorney General and the State Engineer regarding the certificate of convenience and necessity (CC&N) for Currant Creek; assisting in responding to objections (including USA Power's own objection) to PacifiCorp's application for a CC&N; preparing witnesses for the CC&N hearing; speaking with the media regarding Currant Creek; assisting with air permit issues; and assisting with the RFP. (R2726-30, 2777-84, 2807-11, 2868-71, 2878-79, 3044-47, 3055-59, 4900) These facts establish there are disputed issues regarding the scope of Williams/HRO's representation of PacifiCorp and its adversity to USA Power.[31]

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[30]The evidence shows disputes regarding whether a second 500-plus MW plant could be built in Mona due to restrictions on the transmission capacity of the Mona substation, water availability, and room for pollutants in the Mona airshed. (R2328, 2866, 3643, 3787)

[31]This case is not similar, as Williams/HRO suggest, to a real estate attorney who helps two different developers close on apartment buildings within "a few blocks" of each other over the span of a few years. (HRO Br. 61-62) Rather, this case is more analogous to the example described in the Restatement as violating an attorney's duty to clients.

> Lawyer has been retained by A and B, each a competitor for a single broadcast license, to assist each of them in obtaining the license . . .[the] Lawyer's representation will have an adverse effect on both A and B [because] . . . Lawyer will have duties to A that restrict Lawyer's ability to urge B's application and vice versa.

Restatement (Third) of the Law Governing Lawyers § 121, cmt. c(i), ill. 1. Indeed,

VI. THE COURT SHOULD REJECT WILLIAMS/HRO'S ARGUMENTS THAT THEIR BREACH OF THEIR DUTY OF LOYALTY DID NOT CAUSE USA POWER DAMAGES BECAUSE THEY MISCHARACTERIZE THE EVIDENCE AND RELY UPON DISPUTED FACTS AND INFERENCES.

Williams/HRO's arguments that there is a lack of causation supporting USA Power's claim for breach of the duty of loyalty are without merit because they ignore or mischaracterize the evidence and repeatedly label many purported facts as "undisputed" when they are disputed and squarely contradicted by the evidence in the record. (HRO Br. 62-70) As explained in USA Power's opening Brief, when properly viewing the evidence, facts and reasonable inferences in favor of USA Power's claims, there are, at a minimum, disputed issues for trial with regard to causation. (Br. 29-32, 75-80)

A. Williams/HRO misstate what USA Power must show to establish the breach caused damages. To show causation, USA Power does not need to prove that PacifiCorp would have completely abandoned any project that would result in a power plant in Mona. (HRO Br. 63) Rather, under Utah law, USA Power need only establish that "[b]ut for defendant's breach of fiduciary duty a reasonable likelihood existed that the [plaintiffs] would have benefitted." Kilpatrick I, 909 P.2d at 1291-92. As described in USA Power's opening Brief, absent Williams/HRO's breach (and Williams' ability to speed the progress of PacifiCorp's competing project due to her knowledge gained while representing USA Power), PacifiCorp (1) would have known it was not possible to have completed a competing power project, without performing its agreed-to purchase of Spring Canyon, in time to get

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Williams/HRO's expert agreed with this principal in his own book on legal ethics, which states: "Such a situation might exist, e.g., if the lawyer's clients are bidding against each other for the same piece of property [because]. . . the lawyer cannot benefit one client other than at the expense of the other." Thomas D. Morgan, Legal Ethics 75 (8th ed. 2005).

the additional generation capacity online *within the time constraints dictated by the IRP* and, thus, would have completed that purchase; (Br. 76-77 & record citations) or (2) would not have been able to complete its competing Currant Creek project *in time to award itself, rather than USA Power, the RFP.* (Br. 77-78 & record citations) Causation is not established by showing PacifiCorp would have never built a plant in Mona; it is established by showing only that a reasonable likelihood existed the ultimate result would have been different and would have benefitted USA Power in some way.[32]

B. USA Power placed second on the RFP. Contrary to Williams/HRO's assertion, that there was a lack of causation due to USA Power placing fourth in the first stage of the

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[32]Williams/HRO's assertion that PacifiCorp reneged on its agreement to purchase USA Power's for its own business reasons -- i.e., being told by UDEQ that PacifiCorp could not use USA Power's air permit for Currant Creek -- is not true. (HRO Br. 11-12) PacifiCorp reneged via voice-mail left either on the evening of March 17 or the morning of March 18. (R2210-16, 4565-68) That was at least one full day before PacifiCorp met with UDEQ and purportedly learned it could not use USA Power's air permit at the Panda site. (R8397) In addition, the assertions that PacifiCorp's decision was fueled by its acquisition of "key" assets from Panda and USA Power "wanted too much money" (HRO Br. 11-12) are disputed. (R2210-13, 3259, 4564-68, 8397)

Likewise, Williams/HRO attempt to color the factual background of the case (but not included in their Argument) by characterizing USA Power's project as having been "doomed by market forces are without merit. (HRO Br. 20-22) Williams/HRO rely almost exclusively on the opinion of their expert, John Reed. However USA Power's expert, David Olive, reviewed that opinion and fundamentally disagreed, explaining the comparison was invalid because the market on which Reed opined concerned the much riskier Merchant plant development strategy (R3773-77) and Spring Canyon was not a merchant project but instead had strategically targeted markets. (R3774-75) Unlike the developers and projects on which Reed opined, "[power purchase agreement]-backed projects such as Spring Canyon created higher and more stable value through predictable returns which were not driven by wholesale power prices." (R3788) Further, USA Power had secured investors to provide equity and obtain financing, the capital structure was within industry standards, and the development team was well-qualified and stood ready to provide equity and obtain financing to complete the Spring Canyon project. (R3744)

RFP, that placement is a disputed fact. (HRO Br. 14, 28, 55, 68-69)[33] Williams/HRO's argument based upon this fact -- that USA Power cannot establish that Williams/HRO's breach of the fiduciary duty of loyalty caused USA Power any damage because, had PacifiCorp not chosen Currant Creek, it would have chosen a party that had placed higher in the initial stage of the RFP than USA Power -- cannot be accepted on summary judgment.

There is evidence that USA Power's bid placed second. PacifiCorp conceded it "made its determination to construct Currant Creek following the completion of Round II"[34] (R6512) and, at the end of Round II, on September 12, 2003, PacifiCorp decided its own bid, the "NBA," was the most economical project to meet the 2005 power need. (Id. at ¶ 17) The evidence that USA Power's bid placed second includes: a document produced by PacifiCorp, dated July 28, 2003, entitled "Round II - Peaker Rev2 Deal Summary(s)" which lists the Spring Canyon bid taking second place in Round II (R5847); an email from Mark Tallman,[35] dated September 11, 2003 -- one day before PacifiCorp made the *initial* decision that Currant Creek was the most cost-effective option -- in which Tallman writes "[a]lthough Spring Canyon came in #2, they are not being pursued because the Peaking NBA is the most economic choice" (R5337); and Tallman's testimony that, as of September 11, 2003, it was

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[33]USA Power respectfully disagrees that it has misled the Court in this regard, as contended by Williams/HRO. (Id. at 68) As noted at the beginning of the Statement of Facts in USA Power's opening Brief, USA Power, as the nonmovant, stated the facts and reasonable inferences in the light most favorable to their claims, as this Court views them. (Br. 6 n.5)

[34]The RFP was conducted in two stages. The initial stage, comprised of Rounds I and II, culminated in PacifiCorp awarding Currant Creek the peaker bid. (R8493) Thereafter, PacifiCorp decided to issue a new NBA and continue to evaluate some bids to potentially expand on the existing Currant Creek project. (R4265, 8493) This second stage consisted of Rounds III-IV. (R4265) Spring Canyon also placed second in Rounds III and IV. (Id.)

[35]Williams/HRO cite primarily to Tallman's Affidavit to support their argument that Spring Canyon placed fourth in Round II. (HRO Br. 68-69)

his belief that Spring Canyon took second place in the RFP (R4695-96).[36] It is simply not accurate to contend that there is no dispute about this purported fact.[37]

C. Williams/HRO's services were indispensable to PacifiCorp winning the RFP over USA Power. Contrary to Williams/HRO's assertion, it is disputed that: Williams/HRO's services were not necessary for PacifiCorp to acquire water for Currant Creek, (HRO Br. 63); they did only what any other water attorney would have, (HRO Br. 54); their services to PacifiCorp were routine and PacifiCorp did not derive any particular benefit from Williams/HRO's representation, (HRO Br. 24); and PacifiCorp easily could have and would have obtained water for its plant even if Williams had declined representation (HRO Br. 28). Williams/HRO also attempt to downplay their role in acquiring PacifiCorp's water rights by asserting it is undisputed that WW Ranches did most of the work in acquiring PacifiCorp's water rights. (HRO Br. 17-19)

These assertions are disputed by, *inter alia*, two emails from Mr. Wangsgard and Mr.

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[36]In light of the evidence contemporaneous with the bid decision, the Navigant report, (R8472), prepared nearly six months later, upon which Williams/HRO base their assertions, is of dubious credibility and is not conclusive proof of the RFP results.

[37]Even assuming, solely for the sake of argument, that USA Power did place fourth in the first stage of the RFP, this does not prevent USA Power from showing damages were caused by Williams/HRO's breach of their duty of loyalty. USA Power has also presented, and Williams/HRO have failed to address, evidence which shows there are material issues of fact concerning whether PacifiCorp would have followed through with its purchase of the Spring Canyon project but for Williams/HRO's ability to render the unique service they did. (Br. 42, 76-78) PacifiCorp acknowledged that Spring Canyon was the only project capable of meeting its 2005 power demand. (R10391-403) In fact, USA Power was the **only** developer who had all of the necessary elements in place in March 2003 and was the only developer that had prepared a power market study, analyzed and determined plant configuration and capacity, analyzed "plant-to-load" transmission issues, performed site selection, negotiated real estate purchase options, negotiated water rights options, prepared conceptual designs, acquired air permits, negotiated fuel transportation and interconnect agreements, and had property re-zoned for industrial use. (R2116, 2217, 3721-25, 3297-98, 10391-403)

White, the owners of WW Ranches, stating Williams "single handedly got the board to commit to sign the change application," "[g]etting Goshen's signature would have [sic] not have been possible without her," and she "saved the day." (R3065, 3067) The language in these emails is straight-forward and does not simply show that Williams was "good at her job." (HRO Br. 66) These assertions are further disputed by Williams/HRO's invoices to PacifiCorp wherein they bill PacifiCorp roughly $200,000 for work they now claim WW Ranches conducted (R2732-2811), as well as the invoices and testimony showing that Williams spent substantial time in the Mona area, at USA Power's cost, ferreting out potential water rights sellers, making contacts, and becoming well versed about obtaining water for a power plant in Mona, and then used that information to benefit USA Power's direct competitor, PacifiCorp. (R1994, 2000-05, 2113, 2140-41, 2818-64, 2907, 2913-15, 2921, 2972-3039, 3167-88,3190-95, 3857-67, 4554-55)[38]

Williams/HRO's heavy reliance upon Mr. Clyde's expert opinions is misplaced. (HRO Br. 65-66) Clyde's opinion as to the importance of Williams to PacifiCorp's competing Current Creek project is merely his opinion and does not permit the wholesale disregard of the evidence establishing that Williams was vital to PacifiCorp securing sufficient water rights for its competing project in the time frame that would permit PacifiCorp to award itself, rather than USA Power, the RFP. Indeed, Clyde's opinion is fundamentally flawed because nowhere in the twelve pages of his report does he even

[38]Williams/HRO's citation to David Graeber's statement to the PSC is quoted out of context. (HRO Br. 22) David's statements were in a PSC proceeding that had nothing to do with the disputes in this case, but concerned Williams' involvement in the subsequent award of the CC&N to PacifiCorp. (R8205, 8548) When asked about USA Power's claims actually at issue in this action, he explained they "had a lot to do with conflict of interest." (R8548)

recognize, let alone consider, the specific time constraints in this case. Clyde's opinion also improperly minimizes the importance of Williams' representation of PacifiCorp based upon Wangsgard conducting the ministerial task of preparing the change application and "represent[ing] the applicant before the state engineer." (R8495; HRO Br. 65) Whether Williams performed that task or was the attorney of record does not remove the fact that it was Williams who devised the strategy to obtain water by drilling a new well at Mona (rather than piping it there) by relying on water rights from a Utah Lake point of diversion, that she did so before Wangsgard and White had any involvement with PacifiCorp's Current Creek project,[39] and that she was indispensable in securing water rights for PacifiCorp's project *in time to award itself the contract in the RFP*.[40] (Br. 29-32 & record citations)

D. Only one power plant could have been built in Mona. Contrary to the argument by Williams/HRO, it is disputed that the water rights obtained for PacifiCorp did not affect USA Power's water rights and, after losing the RFP, USA Power remained free to build its own plant and sell power. (HRO Br. 55) These assertions are disputed by evidence that PacifiCorp's selection of Currant Creek in the RFP effectively killed the Spring Canyon project because only one plant could be built in Mona, (R2328, 2866, 3643, 3723, 3787, 6448), including Williams' own notes stating a second 500 MW plant could not be built in

[39]On May 12, 2003, according to the notes of a PacifiCorp employee, Jody Williams first suggested that PacifiCorp "*[d]rill @ Mona use Utah Lake water.*" (R5839) Wangsgard and White did not become involved until late July or August 2003. (R6182, 6201)

[40]Contrary to Williams/HRO's assertion, based upon Clyde's opinion, it is also disputed that the market value of water rights is generally understood by everyone. (HRO Br. 33, 46; R8494) This assertion is disputed by, *inter alia*, USA Power's water sellers' insistence on keeping the price USA Power paid for its water rights confidential and the lengthy negotiation process Williams/HRO undertook on USA Power's behalf, and USA Power paid for, with Juab County water sellers to reach the confidential price. (Br. 20, 30)

Mona due to air quality concerns. (R2866) The argument is also disputed by evidence that placing a new well in Mona for Currant Creek threatened existing water rights owners in Juab County, including USA Power, by adding a new user to the aquifer from a different point of diversion that had priority over existing users. (R5506-08, 2580, 6421-23)

Based on the foregoing, there is no question that there are disputed issues of fact as to whether Williams/HRO's breach of their duty of loyalty caused USA Power to lose the benefit of either (1) completing the sale of Spring Canyon to PacifiCorp or (2) winning the RFP. Accordingly, summary judgment on the claim was in error and should be reversed.

VII. WILLIAMS/HRO'S ARGUMENTS AGAINST PERMITTING A JURY TO INFER DISCLOSURE MISCHARACTERIZE THE NATURE OF THE REQUESTED RULE AND THE CIRCUMSTANCES IN WHICH IT WOULD APPLY, AND THE RULE DOES NOT REQUIRE OVERRULING PRIOR PRECEDENT.

Williams/HRO offer no valid reason why a jury should not be permitted to infer disclosure based upon simultaneous representation of USA Power's direct competitor. First, Williams/HRO's arguments that the Court should not adopt the rule are based on the mischaracterization of it as a presumption. (HRO Br. 27, 39, 48) USA Power has not asked this Court to adopt a presumption[41] that a jury be instructed it must find disclosure of confidential information if it otherwise finds there was simultaneous representation of directly adverse clients; USA Power has only asked the Court to rule that such facts support

[41]"A presumption 'requires the trier of fact, in the absence of evidence . . . on that question, to assume the existence of an ultimate fact' from underlying basic facts." Davis v. Provo City Corp., 2008 UT 59, ¶ 20, 193 P.3d 86 (citation omitted). Further, a presumption carries with it a burden-shifting, either of the burden of presenting a prima facie case or the ultimate burden of persuasion. Utah R. Evid. 301(a); In re Estate of Swan, 4 Utah 2d 277, 284-85, 293 P.2d 682, 686-87 (1956).

an inference of disclosure, which may be drawn *or rejected* by the jury,[42] based upon the evidence of the specific circumstances of that simultaneous representation.[43]

Second, contrary to Williams/HRO's argument, Kilpatrick II and Shaw do not prohibit a trier of fact from inferring disclosure on the facts *in this case* (HRO Br. 48). In Kilpatrick II, there is no indication that the Court had before it any argument that the simultaneous representation itself is evidence from which use or disclosure could be inferred.[44] The issue of disclosure of confidential information was not before the court and the comments in that regard are dicta. Moreover, the advisory opinion as to the need for evidence of disclosure were made in a different context; the discussion did not concern the attorney who *received* the plaintiffs' confidential information, but rather regarding only that attorney's former law firm and another attorney to whom the attorney-client relationship was imputed. Id. ¶¶ 67-68. Here, it was Williams herself who actually represented USA Power, obtained USA Power's confidential information and, during that relationship, personally represented her client's direct competitor, PacifiCorp -- facts which make the inference of use and disclosure

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[42]Because USA Power has asked only that the Court rule that an inference arises from simultaneous representation, there would be no shifting of any burden -- USA Power would still be required to convince the jury that, based upon the circumstances *in this case*, the preponderance of the evidence demonstrates disclosure occurred.

[43]It may well be that a presumption is appropriate. However, that question is beyond the scope of this appeal and can be reserved for another day because it is unnecessary to adopt a presumption to reverse the grant of summary judgment. In addition, this Court need not even reach, in this appeal, the question of whether a jury is permitted to accept or reject the inference of disclosure based on simultaneous representation of adverse parties if the Court finds there is direct or circumstantial evidence that Williams/HRO disclosed or used for PacifiCorp's benefit USA Power's confidential information and reverses on that basis.

[44]The only issue subject to a holding in Kilpatrick II, rather than mere guidance, was whether the lower court correctly ruled as a matter of law the defendant law firm had an implied attorney-client relationship with plaintiffs. 2001 UT 107, ¶¶ 36-54.

reasonable but were not present in Kilpatrick II. Likewise, in Shaw, while there was an ongoing relationship, the plaintiff obtained separate counsel to represent it on the transaction at issue. 2006 UT App 313, at ¶ 15. Thus, neither case directly addressed whether the fact of simultaneous representation by a single lawyer of a client's more-lucrative adversary is evidence itself that supports an inference of use or disclosure.[45]

Third, Williams/HRO's arguments that Bevan and Chrysler are contrary to Utah law and "blindly infer" disclosure and use plainly ignore the facts and holdings in those cases. (HRO Br. 49-53)[46] Bevan and Chrysler only allow a fact finder to infer disclosure and/or use of confidential information where the plaintiff can establish an underlying breach of loyalty by the attorney. Bevan v. Fix, 42 P.3d 1013, 1030-32 (Wyo. 2002); Chrysler Corp. v. Carey, 5 F. Supp. 2d 1023, 1033-34 (E.D. Miss. 1998). It was this underlying breach that provided a basis upon which a fact finder could infer that an attorney who engages in the subsequent representation of interests adverse to a former client on a substantially similar matter also disclosed and/or used the former client's information in the course of the adverse representation. Williams/HRO's argument that these cases should not apply because they involved subsequent adverse representation (HRO Br. 49-52) ignores that the reasoning that led those courts to adopt a rule allowing an inference of disclosure *is even more compelling* here, where an attorney simultaneously represents direct competitors for a single contract,[47]

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[45]In Shaw, the evidence the plaintiff argued was disclosed was not before the court and it was disputed whether the defendant attorney ever even obtained the information. 2006 UT App 313, at ¶¶ 31-37.

[46]Williams/HRO's argument that their representation of PacifiCorp was "far more limited" than that in Chrysler and Bevan because they only represented PacifiCorp regarding water rights (HRO Br. 51) is disputed as discussed supra, Part V.B.

[47]For the same reasons conflicts of interest cannot be consented to when a lawyer could not

thereby assuming simultaneous and irreconcilable duties.[48]

VIII. WILLIAMS/HRO'S ARGUMENTS THAT USA POWER FAILED TO PRESERVE CERTAIN ISSUES FOR APPEAL OR THE COURT SHOULD NOT CONSIDER CERTAIN EVIDENCE ARE WITHOUT MERIT.

Williams/HRO incorrectly argue that USA Power failed to preserve issues for appeal or that certain evidence cannot be considered in reviewing summary judgment.

Regarding the preservation arguments, the Court should reject them because the record reveals each issue was preserved. Preservation requires only that an issue be presented to the district court in such a way that the district court "has an opportunity to rule on that issue." 438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801.

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reasonably conclude she can provide both clients competent representation, in the context of simultaneously representing a client's direct competitor, rather than a former client's, it is more reasonable to infer the lawyer failed to safeguard the client's confidential information.

[48]Williams/HRO's list of cases purportedly establishing that Bevan and Chrysler do not set out a majority rule (HRO Br. 49 n.22), in reality, do not address whether an *inference* is permitted or are cases where the defendant attorney did not have confidential information that could benefit a new adverse client in the first place. See, e.g., Richter v. Van Amberg, 97 F. Supp. 2d 1255, 1261-62 (D.N.M. 2000) (judgment as matter of law at close of plaintiff's case in chief where attorney had no information of former client related to representation of new client); Wilbourn v. Stennett, Wilkinson & Ward, 687 So.2d 1205, 1216-17 (Miss. 1997) (in case where plaintiff was formerly represented by attorneys who had left firm, it was not appropriate to *conclusively presume* (1) that knowedge was also held by current attorneys at the firm and (2) that such current attorneys misused that knowledge); City of Garland v. Booth, 895 S.W.2d 766, 772-73 (Tex. App. 1995) (*conclusive presumption* not appropriate where it was undisputed attorneys *did not receive* confidential information pertaining to subject matter of representation of later client); Capital City Church of Christ v. Novak, 2007 WL 1501095, at *2-4 & n.3 (Tex App. 2007) (unreported decision where court rejected adopting *conclusive presumption* of disclosure of confidential information where former client could not identify any confidential information *given* to attorney). Even if the cases cited by Williams/HRO concerned a permissive inference, they are not on all fours with this case, where the evidence unquestionably supports that Williams/HRO had confidential information of USA Power's (regarding the narrowed pool of sellers in Juab County and USA Power's confidential water price), and that information could directly benefit PacifiCorp's Current Creek project.

First, Williams/HRO argue that USA Power may not on appeal rely upon direct evidence of Williams' disclosure of its confidential information -- i.e., the handwritten notes produced by PacifiCorp, (R7137), and a PacifiCorp document disclosing the confidential price USA Power paid for its water rights (R2890) -- because USA Power "did not claim below that they had *direct* evidence" that Williams/HRO disclosed USA Power's confidential price. (HRO Br. 32 (emphasis in original))[49] This argument fails. USA Power did present this evidence below as direct evidence of Williams' disclosure of confidential information and, in discussing it at oral argument, USA Power's counsel stated "the amount that [Williams is] telling Pacific Corp [sic] in February is the amount that she had negotiated. That is a disclosure of confidential information." (R8167 at 28-34) USA Power's counsel likewise noted that the direct evidence presented "is clearly evidence from which a jury could find that Ms. Williams disclosed confidential information." (R. 8167 at 34)

Further, even if USA Power had not presented this evidence as "direct" evidence of disclosure, there is no requirement that a party must expressly label evidence as either "direct" or "circumstantial" in opposing a summary judgment motion or to rely upon that evidence to show a grant of summary judgment was in error. There is no question that USA Power sufficiently presented the direct evidence of disclosure to the district court below, and, indeed, the sufficiency of USA Power's evidence of Williams/HRO's disclosure was a central issue upon which the district court ruled. (R7618-19)

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[49]Williams/HRO's argument that this is no evidence that PacifiCorp made a certain offer or that the offer was based upon knowledge of USA Power's confidential price (HRO Br. 33, 34 n.14) is based upon the impermissible inference that PacifiCorp's offer to purchase water rights in Mona for the exact price USA Power paid was mere coincidence, and not based upon the confidential price that Williams/HRO disclosed to PacifiCorp.

Second, Williams/HRO erroneously argue that USA Power has not preserved the ability to assert on appeal a disclosure of confidential information based on the misuse and disclosure of the narrow pool of water sellers and range of sale prices Williams had obtained merely because USA Power's "memorandum below . . . did not specify that [USA Power] were basing a claim" upon it. (HRO Br. 45). This basis for the claim for breach of the duty of confidentiality was unquestionably preserved both in its motion to supplement the record, which was granted, and at oral argument. (R7127, 7137-39, 7338-39, 7581-82, 8167 at 26-48) Indeed, USA Power stated below that it was basing its claims of Williams/HRO's use of its confidential information, in part, on the use of the identities of water sellers and market price information. (R8167 at 30, 33-34) As USA Power's counsel stated to the district court, "it's not only the price that this [evidence] demonstrates disclosure of, it demonstrates that [Williams] disclosed the people that she had narrowed down as possible sellers." (Id.)

Regarding Williams/HRO's evidentiary objections (HRO Br. 33-34), these arguments also fail because they have been waived or the evidence in question was considered by the district court. On a motion for summary judgment, evidence not objected to below is deemed admitted on appeal and the party "waives the right to show that they do not comply with Rule 56(e)." Hobelman Motors, Inc. v. Allred, 685 P.2d 544, 546 (Utah 1984). This rule is necessary because the failure to object to consideration of this evidence below deprives the other party from curing any asserted foundational or related defects.[50]

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[50]See also Salt Lake City Corp. v. James Const., Inc., 761 P.2d 42, 46 & n.8 (Utah Ct. App. 1988) (finding party waived right to object to affidavit made without personal knowledge of underlying facts where party failed to object or move to strike affidavit below and noting failure to object to affidavit was calculated risk to prevent district court from allowing opposing party to resubmit proper affidavit); 11 Moore's Federal Practice, § 56.14 (Matthew

Williams/HRO urge this Court not to consider Ted's testimony that Mr. Keyte told him PacifiCorp offered another water seller the exact confidential price USA Power had paid for Keyte's rights. (HRO Br. 33-34) Williams/HRO argue this information is not based on personal knowledge and is hearsay. (Id.) However, Williams/HRO did not move to strike this testimony below and made no objection when it was presented at oral argument. (R8167 at 31) As such, they may not claim on appeal that the testimony could not be considered under Rule 56(e) or demonstrate on appeal that there are disputed issues of fact.[51]

Williams/HRO also argue this appeal from summary judgment cannot include reference to pages from the PacifiCorp employee's notebook due to an asserted lack of authentication and foundation. (HRO Br. 34) However, this argument fails because Williams/HRO did not file any cross-appeal.

In Smith v. Four Corners Mental Health Ctr., 2003 UT 23, 70 P.3d 904, defendants argued in favor of affirming summary judgment in their favor on the plaintiffs' claim, in part, because the plaintiff's evidence was inadmissible. Id. ¶¶ 47-48. The district court, however, had denied a motion to strike that evidence and defendants did not cross-appeal from that specific ruling. Id. ¶ 48-49. This Court refused to consider whether the district court erred in its ruling denying the motion to strike, explaining that "[l]itigants must 'cross-appeal or cross-petition if they wish to attack a judgment of a lower court for the purpose of enlarging

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Bender 3d ed.) ("Rule 56(e) defects such as unsworn or uncertified affidavits, deposition testimony or unauthenticated documents, are waived and those pieces of evidence will be admissible in a summary judgment proceeding if no motion to strike has been made . . . .").

[51]Notably, Mr. Keyte was identified as a trial witness in USA Power's disclosures and, had a timely objection been made below to the repetition of Keyte's out of court statements, USA Power could have responded by submitting Keyte's own affidavit on the point.

their own rights or lessening the rights of their opponent.'" Id. ¶ 49 (citation omitted).

Likewise here, the pages were submitted with USA Power's motion seeking leave to submit them. (R7127, 7137, 7338-39) The district court's ruling separately and specifically granted USA Power's motion for leave to submit the notes, as did the subsequent Order, which was prepared by Williams/HRO. (R7623, 7629, 7631 at ¶ 5) Because the Court could not accept Williams/HRO's argument that the pages should be disregarded without also reversing the district court's Order granting USA Power's motion, the argument attacks that Order for the purpose of enlarging Williams/HRO's rights and lessening the rights of USA Power. Pursuant to Smith, Williams/HRO are not permitted to do this because they did not file any cross-appeal and their argument, therefore, should be rejected.[52]

CONCLUSION

Based upon the foregoing and as stated in USA Power's Opening Brief, the Court should reverse the grant of summary judgment on each of USA Power's claims.

DATED: April 3, 2009

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[52]USA Power presumes a foundation or authentication objection was properly raised below. Otherwise, as described above, it was waived for purposes of appeal. Hobelman Motors, 685 P.2d at 546. Although at oral argument Williams/HRO's counsel made a speaking objection for lack of foundation or authentication, he referred the district court to the written submission opposing USA Power's motion for leave to submit the notes, that was based only on the grounds of timeliness. (R7549-55, 8167 at 28-29 (objecting that "there's no foundation for these documents" and "these are not notes of Ian Andrews," but referring court to written motion and opposition).

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2009, two true and correct copies of the REPLY BRIEF OF APPELLANTS USA POWER, LLC, USA POWER PARTNERS, L.L.C., AND SPRING CANYON ENERGY, LLC were served via mail, postage prepaid, to the following:

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